Corporations Committee
Business Law Section
The State Bar of California
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January 7, 2005

To: California Department of Corporations
Attn: Kathy Womak, Office of Law and Regulation
1515-K Street, Suite 200
Sacramento, CA 95814
Fax: (916) 322-3205
Email: regulations@corp.ca.gov

Re: Request for Information Regarding the California Corporate Disclosure Act of 2002

Committee Position:

☒ Support Repeal or Amendment

Approved by Executive Committee on December 17, 2004

Committee Contact:

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I. Statement of Position

The Corporations Committee (the "Committee") of the Business Law Section of the State Bar of California welcomes this opportunity to provide these comments in response to the December 1, 2004 request by the Department of Corporations for public comment on the

California Corporate Disclosure Act (the "Disclosure Act")[1]. For the reasons set forth in this report, the Committee supports repeal or, in the alternative, amendment of the Disclosure Act. The Committee looks forward to working with members and the staff of the Department of Corporations and the Legislature to address the issues identified herein.

II. Comments

Necessity of Disclosure Act. The Committee does not believe that the Disclosure Act is necessary. Most of the information required to be contained in the filings with the Secretary of State pursuant to the Disclosure Act is already disclosed in filings with the Securities and Exchange Commission (the "SEC"), which is generally available free of charge to the public electronically. Furthermore, since the information filed with the SEC is far more extensive than that filed with the Secretary of State pursuant to the Disclosure Act, any investor who desires to research information about a corporation would be far better served to search the filings with the SEC.

Compliance with the Disclosure Act Has Been Costly. The members of the Committee can attest, based upon their personal experience in advising clients on their disclosure obligations under the Disclosure Act, that the costs of complying with the Disclosure Act have been material, in large part due to the difficulties of understanding the Disclosure Act's provisions and of assembling different information for California than is required for the SEC. It involves the time not only of the lawyers involved in compiling and receiving the information, but the directors and officers in supplying the information. Application of the Disclosure Act to "foreign private issuers" has been particularly costly, as much of the information required by the Disclosure Act is not required to be disclosed by such issuers under the SEC's rules or generally by the rules governing such issuers by the country of their organization.[2]

Limited Benefit to Interested Parties. The Committee acknowledges that there may be a limited benefit to interested parties from not having to examine SEC filings to pick out certain key information. However, that benefit is premised on the assumption that it is the only information they are looking for and they are aware that the information is available in a California filing. As practitioners working with public corporations and investors, the Committee does not expect to use the information filed under the Disclosure Act in any meaningful or regular way.

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[1] *See* Corporations Code Sections 1502 and 2117 as amended by Assembly Bill No. 55 (Chapter 1015, Statutes of 2002) and Corporations Code Sections 1502.1 and 2117.1 as added by Assembly Bill 1000 (Chapter 819, Statutes of 2004).

[2] A "foreign private issuer" is defined by the SEC in its Rule 3b-4, 17 C.F.R. §240.3b-4, to mean a corporation or other organization incorporated or organized under the laws of any foreign country and, generally, that has less than a majority of its shareholders and assets located in the United States. The primary disclosure form for foreign private issuers, Form 20-F, requires the disclosure of compensation "unless individual disclosure is not required in the company's home country and is not otherwise publicly disclosed by the Company." Typically, foreign private issuers do not make the type of disclosure concerning director and officer compensation that is made by domestic issuers reporting to the SEC.

Potential Harm of Disclosure Act. The information required to be provided pursuant to the Disclosure Act is not as current as information required by the SEC. An interested party who reviews the California filing may rely on information provided in it that has been modified or superseded by more recent information provided to the SEC, which could be materially different. As a result, interested parties could be harmed by their use of the information contained in the California filing.

Adverse Impact on Californians. The Committee believes that the Disclosure Act reinforces the oft-expressed perception that California's regulatory environment is becoming increasing hostile for business. The Committee is aware of situations where corporations have restructured their operations to have subsidiaries qualify to transact intrastate business in California to avoid the parent company being subject to the requirements of the Disclosure Act. The interposing of a California-specific subsidiary for the transaction of intrastate business in California may disadvantage Californians by potentially reducing the ability to make claims against large foreign corporations who would otherwise qualify directly.

Conformity with Federal Disclosure Law. The Committee believes the Disclosure Act should, insofar as it is not repealed and is practicable, conform to the disclosure requirements of federal law, and require disclosure beyond that required by federal law only when the benefits of doing so clearly outweigh the additional burdens imposed upon corporations subject to the Disclosure Act.[3] Such inconsistency leads only to confusion on the part of the public and unnecessary burdens on the reporting corporations. Accordingly, the Committee is of the view that the Disclosure Act would be on sounder footing, would impose fewer burdens of compliance upon public corporations, and would promote investor understanding through consistent interpretation if its provisions conformed, insofar as practicable, with the comparable requirements imposed by the SEC upon public corporations.

Similar Laws in Other States. The Committee is not aware of any other states having a similar law. Nevada considered such a law in 2003, but instead enacted a requirement for each publicly traded corporation to list its Central Index Key on its filings. The Nevada Secretary of State is required to include on its Internet website instructions describing the manner in which a member of the public may obtain information concerning the corporation from the SEC.[4]

Alternatives to Disclosure Act. The Committee believes the best alternative is the approach adopted by Nevada. This approach would be as effective for carrying out the purpose of the Disclosure Act, and possibly even more effective since it would point interested parties to far more information concerning the corporation than is currently available pursuant to the Disclosure Act. It would also substantially reduce the burden on corporations conducting business in California.

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[3] The areas of inconsistency include the number of executives for which executive compensation disclosure is required, the number of years for which involvement in legal proceedings disclosure is required and the dollar amount of monetary financial judgments for which disclosure is required.

[4] Nevada Rev. Stats. 78.150(3)(b) and 80.110(1)(c).

III. Recommendation

The Committee recommends the following actions be taken with respect to the Disclosure Act in order of preference:

1. Repeal the Disclosure Act.

2. Amend the Disclosure Act to adopt the approach taken by Nevada.

3. Amend the Disclosure Act to conform the required disclosures exactly to the similar disclosures required by federal securities laws.

IV. Germaneness

The Committee believes that its members have the special knowledge, training, experience, and technical expertise to provide helpful comments on the Disclosure Act, and that the position advocated herein would promote clarity and consistency in the law and improve coordination between state and federal law in the regulation of corporate disclosure to security holders without compromising the Disclosure Act's purpose.

V. Caveat

This report is that only of the CORPORATIONS COMMITTEE of the BUSINESS LAW SECTION of the State Bar of California. The positions expressed herein have not been adopted by either the State Bar's Board of Governors or overall membership of the BUSINESS LAW SECTION, and is not to be construed as representing the position of the State Bar of California.

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Very truly yours,

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